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(i)

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 592

ALLEN CALCULATORS, INC., APPELLANT

v.

**THE NATIONAL CASH REGISTER COMPANY AND THE
UNITED STATES OF AMERICA**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE SOUTHERN DISTRICT OF OHIO**

BRIEF FOR THE UNITED STATES

OPINION BELOW

No opinion was rendered by the district court.

JURISDICTION

On November 16, 1943, the district court entered an order (R. 16) overruling appellant's motion for leave to intervene in a proceeding arising from the petition of appellee National Cash Register Company for permission to take certain action pursuant to the provisions of a final decree entered against it in an equity proceeding under the Sherman Act brought by the United States. A petition for appeal was filed on

December 4, 1943, and was allowed on December 10, 1943 (R. 23-25).

The jurisdiction of this Court is invoked under Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. sec. 345, and under the Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. sec. 29. This Court postponed the question of its jurisdiction to the hearing on the merits (R. 108).

QUESTIONS PRESENTED

The Government is interested in this case because of the importance to it of the principles governing intervention of private parties in government antitrust litigation. In addition, the Government wishes to make clear the position it took in the district court, which appellant treats as of some consequence. Accordingly, the only points considered in this brief are:

- (1) Whether the position of the Government in the district court was that of an adverse party.
- (2) Whether appellant was entitled to intervene.

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Rule 24 of the Rules of Civil Procedure provides in part:

- (a) *Intervention of Right.*—Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when

the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof.

(b) *Permissive Intervention.* — Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

STATEMENT

On February 1, 1916, a consent decree was entered in the district court in a suit brought by the United States under Sections 1 and 2 of the Sherman Act against the National Cash Register Company (referred to herein as Cash Register) and others (R. 1). Paragraph Second, subdivision (p), of the decree prohibits Cash Register from acquiring ownership or control of the business or plant of any competitor engaged in the manufacture or sale of cash registers or other registering devices, but provides that in case any such acquisition is desired:

a petition may be presented to this Court stating the reasons therefor, and if the Court upon investigation into all the circumstances of the case and after notice of not less than sixty days to the Attorney General shall determine that such business or patents or plant so desired to be acquired will supplement the plant, patents, machines, or facilities of the defendant corporation and that the acquisition thereof is desired for that purpose and will not substantially lessen competition, then jurisdiction is reserved to pass an order permitting the same upon such terms and conditions as may be right (R. 5-6).

In August 1943 Cash Register, pursuant to the above provision, filed a petition with the district court for leave to acquire all or a majority of the stock of the Allen-Wales Adding Machine Corporation (referred to herein as Allen-Wales). The petition alleged that 94% of the business of Allen-Wales, other than war production, consisted in the manufacture and sale of adding machines, that Cash Register did not manufacture or sell adding machines as such, and that there was no substantial competition between the two companies (R. 6-12). Notice of the petition was served upon the Attorney General as prescribed by subdivision (p) (R. 13).

The United States filed an answer requesting that the petition be denied. The grounds of its opposition were that the acquisition would (1) eliminate competition between the cash registers

of Cash Register and the cash drawers of Allen-Wales and between these companies in bookkeeping machines, (2) eliminate potential competition between these companies in adding machines, (3) eliminate competition at the distribution level by cutting off Allen-Wales as a source of supply for independent distributors of business machines and jeopardize the continuance of such distributors as sales outlets for other manufacturers, and (4) would have the same effects on competition and prospective competition as certain practices charged in the complaint upon which the consent decree of February 1, 1916, was based (R. 14-16).

The Government and Cash Register entered into a stipulation as to various facts (R. 45-47). The stipulation also provided that the Government might present to the court replies received by the Department of Justice from a questionnaire which it had sent to dealers handling Allen-Wales products and that Cash Register would not object to such evidence upon the ground of hearsay or incompetency.

At the opening of the hearing the appellant moved for permission to intervene (R. 29). Counsel for the United States stated that it had no objection to the application to intervene, that it felt that the application came within Rule 24 (b) (2) of the Federal Rules of Civil Procedure providing for "permissive intervention" and should be granted (R. 29, 34). The motion for intervention, which was objected to by Cash Regis-

ter; was at first conditionally granted by the court but was finally rejected (R. 29, 30, 41-44).

The Government in its opening statement opposed the granting of Cash Register's petition (R. 72-74). The witnesses for Cash Register were cross-examined by the Government and, after appellant had been denied leave to intervene, the Government called appellant's president as a witness (R. 75-78). The Government at the close of the hearing again opposed granting Cash Register permission to acquire Allen-Wales stock (R. 85-104).

The court, following the hearing, entered a decree which granted the petition of Cash Register but provided that acquisition of Allen-Wales stock by Cash Register should bind it to the performance of certain conditions designed to protect dealers and distributors of Allen-Wales products and to maintain such distributors as outlets for the products of other business-machine manufacturers (R. 19-21). Neither the Government nor Cash Register has appealed from this judgment.

ARGUMENT

I

THE UNITED STATES TOOK AN ADVERSARY POSITION IN THE PROCEEDING IN THE DISTRICT COURT

Appellant's brief (pp. 9-10, 18, 22) refers repeatedly to the Government's position in the proceeding below as having been "non-adversary."

and argues from this assumption the inadequacy of the Government's representation of appellant's interests. We think the Court should be given an accurate statement of the position which the Government took.

It is true that counsel for the Government interpolated in his final argument (R. 86) that he did not think the proceeding should properly be regarded as an adversary one, and that "we of the Department of Justice are in effect acting as commissioners in presenting to this Court information and data upon which the Court can act".¹

But these statements did not prevent Government counsel from opposing Cash Register's petition at every stage of the proceeding. The Government opposed the petition in its answer, in its opening statement to the court, and in its closing argument (*supra*, pp. 4-6). It queried those elements of the trade which it believed would probably be most seriously affected by the proposed acquisition and introduced the replies to this query as an exhibit (R. 37-39; Gov. Ex. 105, R. 49-54).

¹ These statements were made with express reference to paragraph Second, subdivision (p), of the 1916 decree which vests in the court jurisdiction to permit acquisitions which the decree otherwise prohibits "if the Court upon investigation into all the circumstances of the case" and after 60 days' prior notice to the Attorney General "shall determine" that the acquisition will supplement Cash Register's plant, machines or facilities and that it is desired for this purpose and will not substantially lessen competition.

It introduced six other exhibits (see R. 39, 43, 93), cross-examined Cash Register's witnesses, and called the president of appellant as its own witness (*supra*, p. 6). The Government emphasized the recent incipency, rapid growth, and real competitive nature of the Allen-Wales adding cash drawer, and that the acquisition of Allen-Wales would remove the largest of the independent competitors in the industry (R. 14, 15-16, 47, 90, 92, 98). Indeed, the district court stated in this connection (R. 32):

This is kind of a semi-government proceeding in which the Government, on behalf of everybody, is opposing the confirmation of this sale.²

It is to be noted that as a result of the Government's opposition to the acquisition of Allen-Wales by Cash Register, the court in its order imposed conditions continuing the availability of Allen-Wales machines to distributors for a period of at least five years of normal production and of parts for a period of at least ten years of normal production, and also retained jurisdiction to permit Allen-Wales distributors to secure compliance by Cash Register with the conditions of the order (R. 18-22).

² The court at a later point in the Government's closing argument, said (R. 99):

"I don't see what else you could furnish. I think the statistics right down to the minute have been furnished, and I don't see what else the Government could do to add to the case."

The position taken by the Government is to be judged by its pleadings, general conduct of the case, and the effect of the entire argument which it addressed to the court, and not by any single remark of counsel in closing argument taken out of its context. The proceeding as a whole was conducted on an adversary basis, as will be plain from an examination of the record. The obvious purpose of the statement to which appellant refers was to point out that in this type of proceeding Government counsel, to a greater extent than private attorneys, act as officers of the court.

II

APPELLANT'S RIGHT TO INTERVENE

Rule 24 (a) of the Rules of Civil Procedure states the circumstances under which there may be intervention as of right. We submit that it is clear that the present case does not fall within any of these categories.

The rule permits intervention of right "(1) when a statute of the United States confers an unconditional right to intervene". There is no such statute applicable to the present case. While Section 16 of the Clayton Act (15 U. S. C. sec. 26) authorizes private parties to sue for injunctive relief in the federal courts against threatened damage by reason of a violation of the antitrust laws, this section clearly does not grant a right, much less an "unconditional" right, to intervene

in injunctive suits brought by the United States to enforce the provisions of the Sherman Act.

Likewise this case is not within that part of Rule 24 (a) reading "(2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action". Appellant was not a party to the proceeding and could not be bound by the court's judgment. It is therefore unnecessary to consider whether the appellant had an "interest" in the litigation within the meaning of the rule or whether, if so, representation of this interest by the Government was or might be inadequate.

In the instant case there was no property in the custody of the court or of one of its officers and the case does not fall within the final provision of Rule 24 (a) reading "(3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof".

It has been uniformly held that there can be no intervention as of right in a case of this character.² Furthermore, an unconditional right of

² *Ex parte Tobacco Board of Trade*, 222 U. S. 578; *United States v. Columbia Gas & Electric Corp.* (D. C. Del.), 27 F. Supp. 116, appeal dismissed for lack of jurisdiction, 108 F. (2d) 614; certiorari denied, 309 U. S. 687; *United States v. Columbia Gas & Electric Corp.* (D. C. Del.), 28 F. Supp. 168, appeal dismissed for lack of jurisdiction, 108 F. (2d) 614 (C. C. A. 3) certiorari denied, 309 U. S. 687. Cf. *Missouri-Kansas Pipe Line Co. v. United States*, 312 U. S. 502.

intervention, in proceedings by the United States to enforce the antitrust laws, on the part of all persons whose economic interests might be affected by the outcome of the Government proceeding, would open the door to delaying interventions and might seriously interfere with the orderly disposition of such litigation.

While the Government contends that there is not, and should not be, any absolute right of intervention in a suit by the Government to enforce the antitrust laws, it believes that Rule 24 (b), under which allowance of intervention rests in the discretion of the court, safeguards against obstructive or unwarranted intervention. Here, appellant's position certainly raised questions in common with those which were in issue between the Government and Cash Register, within the meaning of Rule 24 (b) (2). Intervention here was consented to by the Government, and presumably would not have obstructed the proper protection of the public interest. Under circumstances such as those presented in the instant case, the Government believes that Rule 24 (b) (2) should be given a liberal interpretation in favor of intervention, and that appellant should have been allowed to intervene. It does not follow, of course, that the denial of appellant's application was an abuse of discretion, and the Government takes no position as to whether the court's

order denying intervention constituted reversible error. Cf. *Missouri-Kansas Pipeline Co. v. United States*, 312 U. S. 502, 506.

Respectfully submitted.

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